SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 363

S. R. BRACKIN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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INDEX.

Subject Index.

Citations.

Cases:

Statutes:

Miscellaneous:

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S. R. BRACKIN,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner, S. R. Brackin, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause.

Opinion Below.

The opinion of the Court of Claims was entered April 6, 1942 (R. 7), and is reported at 44 F. Supp. 327.

Jurisdiction.

The judgment of the Court of Claims was entered April 6, 1942 (R. 20). Petitioner's motion for a new trial was overruled June 1, 1942 (R. 21). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Question Presented.

Is petitioner entitled to recover from the United States a payment made by him to the United States for cotton tax exemption certificates when the surrender of such certificates (or the payment of a larger amount of tax) was required by the Bankhead Cotton Act before petitioner could market any cotton produced by him in excess of an amount allotted to him by the Secretary of Agriculture and when petitioner's money was covered into the general fund of the Treasury?

Statutes Involved.

The statutes involved are the Bankhead Cotton Act of 1934, and Sections 145 and 151 of the Judicial Code. The pertinent parts of these statutes are set out in the Appendix, *infra*, pp. 12-18.

Statement.

In 1934 Congress enacted the Bankhead Cotton Act under the terms of which there was levied a tax upon the ginning of cotton from that part of the crop which was produced and marketed by any farmer in excess of amounts allotted to him by the Secretary of Agriculture. The tax was fifty per cent of the value of the cotton, but not less than five cents per pound (R. 7-8).

Pursuant to the regulations issued under the Bankhead Cotton Act, tax exemption certificates were issued free to each cotton producer for the full amount of his individual quota. In order to market his cotton a producer was required to pay the tax levied by the Act or to deliver to the ginner tax exemption certificates covering the amount of cotton to be ginned. Upon the payment of the tax or the surrender of tax exemption certificates, the ginner issued a bale tag which permitted the producer to market his cotton in the usual way, without subjecting himself to the heavy penalties imposed for violation of the Act (R. 8, 13-14).

The law provided that the tax exemption certificates should be transferable. The Department of Agriculture anticipated that some farmers would produce more cotton than the amount allotted to them and that others would produce less. It set up pools to effectuate the transfer of certificates between farmers. The regulations provided that these certificates were transferable only through the pool or under the supervision of the county agent. In either event the county agent issued new certificates directly to the purchasing farmer at a fixed rate of approximately 4 cents per pound and dated the certificates on the date of purchase (R. 9, 11, 13).

Petitioner produced more cotton in the crop year 1935-36 than the quota allotted to him. He could market this excess cotton only by paying a tax thereon of approximately five cents per pound to the Collector of Internal Revenue, or by purchasing exemption certificates at four cents per pound, the price fixed by the Secretary of Agriculture. He chose the latter as the lesser of two evils and purchased from one of the pools tax exemption certificates in the amount of $346.20 with which he discharged his tax liability (R. 12).

After the Bankhead Act had been held unconstitutional and had been repealed by Congress, petitioner filed with the Treasury Department a claim for refund of the amount paid for said certificates. Petitioner's claim was rejected, as a result of which the present suit was brought in the Court of Claims (R. 12-13).

Respondent filed a general traverse to the petition (R. 6). On April 6, 1942, the Court of Claims filed its Opinion in which it dismissed the petition. One Judge dissented. Another Judge concurred on the ground that petitioner had not made a showing "sufficient to overcome the presumed constitutionality of the Bankhead Act" (R. 19). Petitioner

duly filed a motion for a new trial which was overruled on June 1, 1942 (R. 20-21).

Specification of Errors to Be Urged.

The Court of Claims erred:

1. In failing to hold that the Bankhead Cotton Act was unconstitutional, null, and void.

2. In failing to find and hold that petitioner's money went into the general fund of the Treasury and that respondent had a pecuniary interest in the fund into which petitioner's money was covered.

3. In failing to hold that respondent was retaining petitioner's payment under a contract implied in fact, when such payment was made under such conditions that the parties would expect repayment when the duress of the Bankhead Cotton Act was removed.

4. In failing to find and hold that petitioner's purchase of cotton tax exemption certificates was made under such provisions of law and such regulations of the Agriculture and Treasury Departments, as to amount to duress and compulsion.

5. In failing to reopen the case and reconsider its findings, opinion, and judgment, when respondent (after judgment was rendered in its favor) was so skeptical as to the correctness of the findings that it, by motion tendered to the Court, suggested the possibility that the Court had erred in its findings of fact and opinion on a material question.

6. In holding that, if only the allotment of 10,500,000 bales of tax free cotton had been produced in 1935, no tax would have been due and that the tax was collected only on the cotton produced in excess of such total allotment.

7. In dismissing the petition when the facts of record show that petitioner has a good cause of action against the United States.

Reasons for Granting the Writ.

1. The decision below, in holding the Bankhead Cotton Act to be constitutional (R. 16), is in direct conflict with *Thompson* v. *Deal,* 92 F. (2d) 478 (C. A. D. C.), and *United States* v. *Moor,* 93 F. (2d) 422 (5 C. C. A.), holding such Act to be unconstitutional, and with *Stahmann* v. *Vidal,* 305 U. S. 61, and *United States* v. *Butler,* 297 U. S. 1, wherein the Bankhead Cotton Act was assumed to be unconstitutional. In *United States* v. *Moor, supra,* the Court referred to the subsequent repeal of the Bankhead Cotton Act (49 Stat. 1106, 1155) and said:

> Congress thereby indicated that the Bankhead Act was so intimately related to the Agricultural Adjustment Act that the two should go down together. The two are parts of one plan. It would certainly not be fair to relieve those who had not paid the tax, and deny relief to those who had. We are content to hold that the Bankhead Act shares the fate of the Agricultural Adjustment Act.

The Court of Claims in its Opinion suggests that the foregoing cases have been overruled by *Mulford* v. *Smith,* 307 U. S. 38, where a tobacco program was upheld after it had been approved by two-thirds of the producers, and by *United States* v. *Darby,* 312 U. S. 100, upholding the Fair Labor Standards Act of 1938 on the ground that it was a valid exercise of the commerce power. These cases, however, cannot be stretched to mean that the Bankhead Cotton Act is now constitutional. The instant case is to be distinguished from the first of the above cases because the cotton growers as a group were not entitled to approve or reject the legislation as in the tobacco case. The Bank-

head Cotton Act involved herein is to be distinguished from the Acts in both of the above cases in that the Bankhead Cotton Act obviously sought to accomplish its purpose, not through the Federal power to regular commerce, but through the Federal taxing power. Petitioner and other cotton producers had to pay a tax or purchase tax exemption certificates in order to gin their cotton, regardless of whether any or all of it stayed in the producer's county or State or entered interstate commerce.

2. While the Court stated that it was not necessary to rest the decision on the constitutionality of the Bankhead Cotton Act (R. 16), the only other basis given for the decision is the holding by the Court that petitioner's money was not covered into the general fund and thus the United States received no benefit from it.

Since the Court's Opinion was handed down the respondent has itself, in effect, admitted that the Court erred in this second basis for its decision. On August 17, 1942, respondent filed in the Court a motion "for leave to file the accompanying motion out of time", a copy of which motion and the accompanying motion was served on petitioner. Said motion was denied by the Court on the same day (R. 21). Said motion and the accompanying motion were not set forth by the lower court in the transcript of record. Because of their importance they have, therefore, been attached hereto as a part of the Appendix, pp. 21-30.

The aforesaid accompanying motion invites the attention of the Court of Claims to two letters. The second of these was written by the Acting Secretary of the Treasury in answer to certain questions propounded by the Attorney General. In his letter the Acting Secretary of the Treasury advises as follows:

> *All funds received by the Treasurer of the United States from whatever source are deposited and held*

> *in a single fund commonly known as the General Fund of the Treasury.* Accordingly, the moneys received from the Cotton Tax Exemption Certificate Pool of 1935 were commingled with all other funds received by the Treasurer of the United States from customs duties, internal revenue, sale of public debt obligations, and from miscellaneous sources of every kind and description. They were not segregated from other receipts of the Government. (App. pp. 27-28; italics supplied).

In discussing whether or not the United States received any benefit from the moneys deposited by the Pool in the general fund of the Treasury, The Acting Secretary of the Treasury said:

> After their receipt by this Department, moneys derived from the operations of the 1935 National Surplus Cotton Tax Exemption Certificate Pool were credited to the trust fund receipt account "8530, Deposits of Miscellaneous Contributed Funds, Department of Agriculture." Under the provisions of the Permanent Appropriation Repeal Act of 1934, the amount of such funds credited to this account were appropriated and disbursed for authorized purposes and in accordance with procedures prescribed by law. (App. pp. 26-27.)

In response to another question The Acting Secretary of the Treasury stated:

> After repeal of the Bankhead Act, *Congress • • • could have repealed the appropriation of the amount credited to the account in question or could have reappropriated the balance therein for some other purpose.* (App. p. 28.) (Italics supplied.)

The Court below found that the check given by petitioner bore certain stamps and indorsements (R. 10, 12, 15). These indicate that the money had been covered into the general fund of the Treasury. When the foregoing findings are considered along with the statements made by The Acting

Secretary of the Treasury (and filed herein by the respondent after the Court decided the case in respondent's favor), it appears that the Court erred in failing to find and hold that petitioner's money did go into the general fund of the United States and in failing to find and hold that the United States—having the right to appropriate the fund—did derive a benefit from petitioner's payment.

3. The holding of the Court of Claims that there is no legal obligation on the part of the United States to make refund to the petitioner of the payment made by him is in conflict in principle with *United States* v. *Compagnie Generale Transatlantique*, 26 F. (2d) 195 (2 C. C. A.), and *Sinclair Nav. Co.* v. *United States*, 32 F. (2d) 90 (5 C. C. A.); Cf. *Carriso, Inc.* v. *United States*, 106 F. (2d) 707 (9 C. C. A.); *Dooley* v. *United States*, 182 U. S. 222; *Hvoslef* v. *United States*, 217 F. 680 (S. D. N. Y.), affirmed 237 U. S. 1; and *Bull* v. *United States*, 295 U. S. 247; which decisions allowed recovery from the United States of amounts paid as fines, taxes, or other charges under unconstitutional statutes or taxes paid by mistake under conditions which would not in conscience permit their retention.

It is well established that a contract is implied in fact when it is made, as here, under such conditions that the parties would expect repayment when the compulsion for their actions has been removed. The Courts have repeatedly held that such payments create a contractual or quasi contractual obligation between the payor and the government.

The payment sought to be recovered herein was made by petitioner under the unconstitutional Bankhead Cotton Act, and amounted to approximately forty per cent of the value of his excess production. A tax of forty per cent is

tantamount to a fine and should be refunded just as are fines collected under unconstitutional statutes.

4. The failure of the Court of Claims to hold that the Bankhead Cotton Act exerted duress and compulsion upon petitioner is at variance with *Stahmann* v. *Vidal, supra,* and *Thompson* v. *Deal, supra,* which held that the provisions of said Act did exert duress and compulsion upon cotton producers.

5. In its brief and argument before the Court, respondent represented that the money paid into the National Cotton Pool for exemption certificates in 1935 was not covered into the Treasury of the United States as funds of the United States and that the United States did not derive any profit or benefit from the operation of such pools. The Court accepted this representation as a fact and, obviously, based its holding in the case largely upon it.

After the time had expired for filing a motion for a new trial under the Court's rules, respondent filed a motion "for leave to file the accompanying motion out of time" (R. 21; App. 21-30). On June 8, 1942, just three days after the time had expired for filing a motion for a new trial under the Court's rules, respondent wrote the letter attached to said motion as Exhibit No. 1 (App. 25). Obviously, respondent had misgivings regarding its representation to the Court before the date of that letter and in plenty of time in which to file a motion for a new trial and disclose the true facts which Exhibits No. 1 and 2 (App. 25, 26) disclose. Under such circumstances the Court of Claims should have reopened the case, still within its jurisdiction, and reconsidered it in the light of the facts as now represented by respondent.

6. The Bankhead Cotton Act by its terms applied to the 1934-1935 cotton year and, upon direction of the Secretary of Agriculture, to the 1935-1936 crop year. Under the

terms of the Act, 10,000,000 bales of cotton were to be tax free in 1934 and, by direction of the Secretary of Agriculture, 10,500,000 bales in 1935 (R. 14). The statistics of the Department of Agriculture disclose, and this Court many take judicial notice of the fact, that 9,636,000 bales were produced in 1934 and 10,638,000 in 1935. 23 C. J. 161 (Sec. 19); *City Bank Farmers' Trust Co.* v. *United States*, 74 F. (2d) 692. Thus, the total cotton produced in 1934 was less than the amount which was to have been produced tax free and in 1935 the excess over the amount which was to be tax free was only 138,000 bales.

In 1934 and 1935 respondent collected through its pools and deposited in the Treasury of the United States from the sale of exemption certificates the sum of $22,423,479.94. It also collected as taxes during the two years through the Treasury Department the sum of $1,562,097.69 (R. 11). These amounts aggregate $23,985,577.63, collected under the taxing provisions of the Act by the United States.

The tax rate ranged from 5 to 6 cents per pound on cotton ginned when paid directly to the Collector of Internal Revenue and the exemption certificate price on excess cotton ranged from 4 to 5 cents. Assuming the maximum tax of 6 cents per pound and 500 pounds to the bale, the total tax on cotton produced in 1935 (over the 10,500,000 bales of tax free cotton), would not have exceeded $4,140,000.00. Yet the United States collected the staggering sum of $23,988,577.63 in taxes under the Bankhead Act.

It, therefore, appears that the Court of Claims erred, in imputing to farmers the responsibility for producing cotton in excess of their allotments, when it held that if only 10,500,000 bales had been produced and marketed in 1935, no tax would have been collected.

7. Two bills have been introduced in the Senate of the United States to refund amounts paid for cotton tax exemp-

tion certificates. S. 963, 76th Cong., 1st Sess. and S. 1628, 77th Cong., 1st Sess. The Senate referred these bills to the Court of Claims pursuant to Section 151 of the Judicial Code (28 U. S. C. Sec. 257). S. Res. 286, 76th Cong., 3d Sess. and S. Res. 136, 77th Cong., 1st Sess. That Court is sending to the Senate a copy of its decision in the instant case. On the same date that the Court of Claims handed down its opinion herein it dismissed the petition in the case of *Crain et al.* v. *United States*, 44 F. Supp. 321 which case involves substantially the same issues as the instant case. Petition for a writ of certiorari has already been filed in the *Crain* case (No. 199, October Term 1942).

A decision by this Court on the aforementioned legal questions would not only prevent an injustice to petitioner herein, but would also resolve the conflicts between the lower courts, and furnish desired guidance to the Senate of the United States in the report to it by the Court of Claims.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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August, 1942.

APPENDIX

Bankhead Cotton Act of 1934 (48 Stat. 598, Amended 48 Stat. 1184, 49 Stat. 776, Repealed 49 Stat. 1106)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Declaration of Policy

That in order to relieve the present acute economic emergency in that part of the agricultural industry devoted to cotton production and marketing by diminishing the disparity between prices paid to cotton producers and persons engaged in cotton marketing and prices of other commodities and by restoring purchasing power to such producers and persons so that the restoration of the normal exchange in interstate and foreign commerce of all commodities may be fostered, and to raise revenue to enable the payment of additional benefits to cotton producers under the Agricultural Adjustment Act—

It is hereby declared to be the policy of Congress to promote the orderly marketing of cotton in interstate and foreign commerce; to enable producers of such commodity to stabilize their markets against undue and excessive fluctuations, and to preserve advantageous markets for such commodity, and to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, and to more effectively balance production and consumption of cotton.

* * * * * * *

Sec. 3. (c) For the crop year 1934-1935 ten million bales is hereby fixed as the maximum amount of cotton of the crop harvested in the crop year 1934-1935, that may be marketed exempt from payment of the tax herein levied. Except as provided in section 2, the allotment plan and the tax is hereby declared to be in effect for the crop year 1934-1935.

Tax and Exemptions

Sec. 4. (a) There is hereby levied and assessed on the ginning of cotton hereafter harvested during a crop year

with respect to which this Act is in effect, a tax at the rate per pound of the lint cotton produced from ginning, of 50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound. If the cotton was harvested during a crop year with respect to which the tax is in effect, the tax shall apply even if the ginning occurs after the expiration of such crop year.

* * * * * * *

(e) No tax shall be imposed under this Act with respect to—

(1) Cotton harvested by any publicly owned experimental station or agricultural laboratory.

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

(3) Cotton harvested prior to the crop year 1934-1935.

(4) Cotton having a staple of one and one half inches in length or longer.

(f) The tax shall not be collected upon the ginning of cotton which is to be stored by the producer thereof either on the farm or at such other place as may be permitted by regulations prescribed by the Secretary of Agriculture and the Secretary of the Treasury. In such cases, the payment of the tax shall be postponed, but shall be paid at the time when bale tags are secured for such cotton. Bale tags may be secured for any of such cotton at any time after ginning (1) upon the payment to such persons as the Commissioner may direct, of the amount of tax which would have been payable at the time of ginning, or (2) upon the surrender of certificates of exemption covering an amount of cotton not less than the amount of such cotton. Until bale tags are secured for such cotton, such cotton shall be subject to a lien in favor of the United States for the amount of the tax payable with respect to the ginning of such cotton. The right to postponement of the payment of the tax under this subsection shall be established in accordance with such regulations as the Secretary of Agriculture and the Secretary of the Treasury may prescribe. The Commissioner,

with the approval of the Secretary of the Treasury, shall prescribe regulations providing for stamping the containers of such cotton so as to indicate the time of ginning and the amount of tax payable with respect thereto.

(g) The right to exemption under paragraph (2) of subsection (e) shall be evidenced by a certificate of exemption issued as herein provided, which certificate of exemption shall be conclusive proof of the right to such exemption.

Apportionment

Sec. 5. (a) When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary of Agriculture shall apportion to the several cotton-producing States the number of bales the marketing of which may be exempt from the tax herein levied, * * *.

* * * * * * *

(b) The amount allotted to each State (less the amounts allotted under section 8) shall be apportioned by the Secretary of Agriculture to the several counties in such State * * *.

* * * * * * *

Sec. 7. (a) The amount of cotton allotted to any county pursuant to section 5(b) shall be apportioned by the Secretary of Agriculture to farms on which cotton has been grown within such county.

* * * * * * *

Exemption Certificates

Sec. 9. (a) Exemption certificates shall be issued by the Secretary of Agriculture, upon application therefor, but only upon proof satisfactory to the Secretary that the producer is entitled thereto pursuant to this Act and the regulations thereunder. Any certificate erroneously issued shall be void upon a demand in writing for its return made by the

Secretary of Agriculture to the person to whom such certificate was issued.

* * * * * * *

(d) Any and all certificates of exemption may be transferred or assigned in whole or in part in such manner as the Secretary of Agriculture may prescribe and shall be issued with detachable coupons or in such other form or forms to be prescribed by the Secretary of Agriculture as will facilitate such transfer or assignment. Any person who, in violation of the regulations made by the Secretary of Agriculture, (1) secures certificates of exemption or bale tags from another by sharp practices, or (2) speculates in certificates of exemption or bale tags, and any person securing certificates of exemption or bale tags from another person by fraud or coercion shall, upon conviction thereof, be fined not more than $1,000 or sentenced to not more than one year's imprisonment, or both.

Identification of Tax-paid or Exempt Cotton

Sec. 10. (a) Upon the payment of the tax on any cotton, or the surrender of exemption certificates covering cotton, the collector receiving such payment or certificates shall deliver to the person so paying or surrendering an appropriate number of bale tags which shall be affixed to such cotton.

* * * * * * *

Regulations by the Commissioner

Sec. 12. The Commissioner, with the approval of the Secretary of the Treasury, shall prescribe (a) regulations with respect to the time and manner of applying for, issuing, affixing, and destroying bale tags, and the method of accounting for receipts from the sale of and for the use of such bale tags, and (b) such other regulations as he shall deem necessary for the enforcement of the taxing provisions of this Act.

* * * * * * *

General and Penal Provisions

Sec. 14. (a) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 800 of the Revenue Act of 1926, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed by this Act.

(b) Except as may be permitted by regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury, with due regard for the protection of the revenue, no person shall: (1) Transport, except for storing or warehousing, under the provisions of section 4(f) beyond the boundaries of the county where produced any lint cotton to which a bale tag issued under this Act is not attached; or (2) sell, purchase, or open any bale of lint cotton to which a bale tag issued under this Act is not attached.

* * * * * * *

(d) Any person who willfully violates any provision of this Act, or who willfully fails to pay, when due, any tax imposed under this Act, or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any bale tag or certificate of exemption made or used under this Act, or who uses, sells, or has in his possession any such forged, altered, or counterfeited bale tag or certificate of exemption, or any plate or die used, or which may be used in the manufacture thereof, or has in his possession any bale tag which should have been destroyed as required by this Act, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such bale tag or certificate of exemption, or who reuses any bale tag required to be destroyed by this Act, or who places any cotton in any bale which has been filled and stamped, tagged, or otherwise identified under this Act, without destroying the bale tag previously affixed to such bale, or who affixes any bale tag issued under this Act to any bale of lint cotton on which any tax due is unpaid, or who makes any false statement in any application for bale tags or certificates of exemption under this Act, or who

has in his possession any such bale tags or certificates of exemption obtained by him otherwise than as provided in this Act, shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment for not exceeding 6 months, or both.

(e) Any person who willfully violates any regulation issued by the Secretary of Agriculture or the Secretary of Agriculture and the Secretary of the Treasury under this Act, for the violation of which a special penalty is not provided, shall, on conviction thereof, be punished by a fine not exceeding $200.

Regulations by the Secretary of Agriculture

Sec. 15. (a) The Secretary of Agriculture is authorized to make such regulations as may be necessary to carry out the powers vested in him by the provisions of this Act.

(b) The Secretary of Agriculture may make regulations protecting the interests of share-croppers and tenants in the making of allotments and the issuance of tax-exemption certificates under this Act.

Appropriations Authorized

Sec. 16. (a) There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

(b) Out of the sums available to the Secretary of Agriculture under the Agricultural Adjustment Act, such sums as may be necessary to carry out the provisions of this Act are authorized to be made available.

(c) The proceeds derived from the tax are hereby authorized to be appropriated to be made available to the Secretary of Agriculture for the purposes of carrying out the cotton program of the Agricultural Adjustment Administration, and for administrative expenses and refunds of taxes under this Act.

* * * * * * *

Collection of Taxes

Sec. 19. The taxes provided for by this Act shall be collected by the Commissioner of Internal Revenue under the direction of the Secretary of the Treasury. Taxes collected shall be paid into the Treasury of the United States.

* * * * * * *

Judicial Code, Section 145. (28 U. S. C. Sec. 250.)

The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *. (Mar. 3, 1887, c. 359, Sec. 1, 24 Stat. 505; Mar. 3, 1911, c. 231, Sec. 145, 36 Stat. 1136.)

Judicial Code, Section 151. (28 U. S. C. Sec. 257.)

Reference of claims by Congress. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant,

gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant. If it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court. (Mar. 3, 1887, c. 359, Sec. 14, 24 Stat. 507; June 25, 1910, c. 409, 36 Stat. 837; Mar. 3, 1911, c. 231, Sec. 151, 36 Stat. 1138.)

IN THE COURT OF CLAIMS OF THE UNITED STATES

Cong. 17766

S. R. BRACKIN,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION FOR LEAVE TO FILE MOTION OUT OF TIME.

Now comes the defendant, by its Assistant Attorney General, and moves for leave to file the accompanying motion out of time.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

IN THE COURT OF CLAIMS OF THE UNITED STATES

Cong. 17766

S. R. BRACKIN,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION.

Now comes the defendant, by its Assistant Attorney General, and shows to the Court the following:

On April 6, 1942, the Court, on special findings of fact and opinion, dismissed the petition herein.

The pendency of other cases in United States District Courts, involving the National Surplus Cotton Tax Exemption Certificate Pool of 1935, prompted the Attorney General to direct an inquiry to the Secretary of the Treasury under date of June 8, 1942, a copy of the letter being attached hereto as Exhibit 1.

A copy of the reply to the letter from the Attorney General under date of July 2, 1942, and signed by D. W. Bell, Acting Secretary of the Treasury, is also attached hereto as Exhibit 2.

The Attorney General propounded certain questions as to the status of monies in the Treasury which certain cotton producers are seeking to recover on account of postal

money orders, cashiers' checks, etc., delivered to the pool manager in accordance with the regulations pertaining to the Bankhead Cotton Act of 1934. Answers to these questions are given in the letter from the Acting Secretary of the Treasury.

The information obtained from the Acting Secretary of the Treasury applies to matter dealt with by the Court in its special findings of fact and opinion herein, particularly in finding 10, and in the second and third paragraphs on page 12 of its opinion.

Wherefore, if in the judgment of the Court, any material inconsistency appears between the language in its special findings and opinion and the answers of the Acting Secretary of the Treasury to the questions propounded by the Attorney General, the defendant moves that the Court exercise its discretion and conform the special findings and opinion to such reconciliation as is deemed appropriate.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

Copy.

EXHIBIT No. 1.

June 8, 1942.

The Honorable the Secretary of the Treasury.

DEAR MR. SECRETARY:

This Department is now handling certain litigation in the courts involving the National Surplus Cotton Tax Exemption Certificate Pool of 1935, which was established and put into operation by virtue of Section 55 of the Regulations pertaining to allotments and tax exemption certificates, under the Cotton Act of April 21, 1934 (Bankhead Cotton Act of 1934, Public No. 169, 73rd Cong., 48 Stat. 498). In connection with the defense of this litigation, it is necessary to secure certain information from your Department. In this litigation surplus cotton producers are seeking recovery on account of postal money orders, cashiers' checks, etc., delivered to assistants in cotton adjustment under the terms of the Regulations above referred to. The defense of these actions presents this Department with the following questions:

1. After their receipt, were moneys held in the Treasury as funds of the United States?

2. Was there any change in the status of the moneys after the repeal of the Bankhead Act?

3. When received, did these moneys go into the "general funds" of the Treasury?

4. Whether, after repeal of the Bankhead Act, these moneys were funds subject to appropriation by Congress.

5. If so, whether after receipt, the moneys were appropriated moneys under the 1934 Appropriation Act?

6. Whether at any time there was any other appropriation act affecting these moneys?

7. Whether at any time the moneys could be withdrawn from the Treasury of the United States, except pursuant to an appropriation of Congress.

8. Does Congress have the sole power of disposition of the unexpended balance, if any, of these moneys?

9. Whether the moneys could be used to defray the ordinary expenses of the Government?

10. If these moneys cannot be used to defray the ordinary expenses of the Government, what then is their status in the Treasury?

11. Is the balance shown in the accounts set up under the 1934 Appropriation Act a charge against the general funds of the Treasury in the same sense that a balance in any appropriation account is a charge against the general funds of the Treasury?

I shall appreciate it if you will let me have an answer to these questions as soon as possible since appropriate action must be taken by this Department in connection with the defense of this litigation within a very short time.

Sincerely yours,

(Sgd.) FRANCIS BIDDLE,
Attorney General.

THE SECRETARY OF THE TREASURY

Washington

July 2, 1942.

My dear Mr. Attorney General:

Reference is made to your letter of June 8, 1942, requesting certain information with respect to moneys received by the Treasury Department in connection with the National Surplus Cotton Tax Exemption Certificate Pool of 1935. The specific questions concerning which you requested advice are separately considered below:

"1. After their receipt, were the moneys held in the Treasury as funds of the United States?"

After their receipt by this Department, moneys derived from the operations of the 1935 National Surplus Cotton Tax Exemption Certificate Pool were credited to the trust

fund receipt account "8530, Deposits of Miscellaneous Contributed Funds, Department of Agriculture." Under the provisions of the Permanent Appropriation Repeal Act of 1934, the amount of such funds credited to this account were appropriated and disbursed for authorized purposes and in accordance with procedures prescribed by law. In order to reflect such appropriation they were set up in a trust fund appropriation account "3T030, Miscellaneous contributed funds, Department of Agriculture" (later changed to 12X8200). (For treatment of the moneys on receipt by the Treasury see answer to question 3.)

In this connection, your attention is directed to photostatic copies of various documents transmitted to Assistant Attorney General Clark on February 20, 1942, and listed under the heading "Division of Bookkeeping and Warrants" in the covering letter of that date signed by Lawrence J. Bernard, Assistant General Counsel. Your attention is further directed to photostatic copies of certain documents which were transmitted to Assistant Attorney General Clark on May 16, 1942, and were listed in the second paragraph of the covering letter of that date signed by Mr. Bernard.

"2. Was there any change in the status of the moneys after the repeal of the Bankhead Act?"

Subsequent to the repeal of the Bankhead Act there was no change in the status of these moneys in so far as the accounts of the Treasury Department were concerned.

"3. When received, did these moneys go into the 'general funds' of the Treasury?"

All funds received by the Treasurer of the United States from whatever source are deposited and held in a single fund commonly known as the General Fund of the Treasury. Accordingly, the moneys received from the Cotton Tax Exemption Certificate Pool of 1935 were commingled with all other funds received by the Treasurer of the United States from customs duties, internal revenue, sale of public debt obligations, and from miscellaneous sources of every kind and description. They were not segregated from other

receipts of the Government. These moneys, as well as any other money in the general account of the Treasurer of the United States were paid out by the Treasurer pursuant to appropriations made by the Congress and in accordance with procedures prescribed by law. The terms "receipts", "moneys", and "funds" as used herein refer to cash (including the proceeds of checks or money orders, etc.) and are to be distinguished from the term "accounts" which is merely an accounting expression to denote classification of receipts, appropriations, and expenditures, as will become apparent from the answer to Question No. 4.

"4. Whether, after repeal of the Bankhead Act, these moneys were funds subject to appropriation by Congress."

Appropriations when made by the Congress and set up on the books of the Treasury Department do not represent a specific amount of cash set apart from other funds in the Treasury to be held until expended for the purposes specified in the appropriation accounts. They are not carried on the books of the Treasurer of the United States. They are only record accounts on the books of the Secretary of the Treasury and merely represent the limit to which administrative and disbursing officers may obligate and disburse Government funds for specified purposes. The Cotton Tax Exemption Certificate Pool of 1935 was not a fund in the sense that such term is ordinarily understood but, like appropriations, was merely an account representing the limit of authority to make disbursements for purposes indicated by the title of the account. After repeal of the Bankhead Act, Congress, therefore, could have repealed the appropriation of the amount credited to the account in question or could have reappropriated the balance therein for some other purpose.

"5. If so, whether after receipt, the moneys were appropriated moneys under the 1934 Appropriation Act?"

As stated in the answer to question 1, the moneys were appropriated under the provisions of the Permanent Appropriation Repeal Act, 1934.

"6. Whether at any time there was any other appropriation act affecting these moneys?"

There appears to have been no appropriation act affecting the moneys here involved, and the books of the Treasury do not reflect any subsequent appropriation act affecting such moneys.

"7. Whether at any time the moneys could be withdrawn from the Treasury of the United States, except pursuant to an appropriation of Congress."

In view of the provision contained in section 9 of Article I of the Constitution of the United States of America that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law" such moneys could be withdrawn only pursuant to an appropriation made by the Congress. Since, as stated in the answer to question 1, these moneys have been appropriated by Congress, they may at present be withdrawn only pursuant to that appropriation. (See also answer to question 8.)

"8. Does Congress have the sole power of disposition of the unexpended balance, if any, of these moneys?"

It may be stated that Congress does ultimately have the sole power of disposition of the unexpended balance. However, if the pending litigation is cleared up and if Congress takes no further action, there appears to be no reason why the unexpended balance cannot be disbursed pursuant to the terms of the existing appropriation. For details of the procedure which would be followed in making the disbursements see paragraphs 4 and 5 of the letter of February 11, 1942, addressed to Assistant Attorney General Clark by Lawrence J. Bernard, Assistant General Counsel.

"9. Whether the moneys could be used to defray ordinary expenses of the Government."

This question has been covered in the answers to questions 3 and 4.

"10. If these moneys cannot be used to defray the ordinary expenses of the Government, what then is their status in the Treasury?"

Answers to preceding questions render consideration of this question unnecessary.

"11. Is the balance shown in the accounts set up under the 1934 Appropriation Act a charge against the general funds of the Treasury in the same sense that a balance in any appropriation account is a charge against the general funds of the Treasury?"

Expenditures from the Cotton Tax Exemption Certificate Pool Account can be considered a charge against the General Fund of the Treasury in the same sense as are expenditures from any appropriation account. In other words, any withdrawals from the Cotton Tax Exemption Certificate Pool account must be made ultimately from the General Fund. In this connection it should be pointed out that the books of the Treasury are not set up in such a manner that the various appropriations appear as liability items offsetting asset items held by the Treasurer of the United States in the General Fund. At any one time the moneys in the General Fund amount to only a small percentage of the total unexpended balances of amounts appropriated by Congress.

The Treasury Department will be glad to furnish any further information at its disposal in connection with the above questions, and to cooperate with you to the fullest extent in connection with the pending litigation.

Very truly yours,

(Sgd.) D. W. Bell,
Acting Secretary of the Treasury.

The Honorable the Attorney General of the United States.

INDEX

CITATIONS

486672—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 363

S. R. BRACKIN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 13–20) is reported in 44 F. Supp. 327.

JURISDICTION

The judgment of the Court of Claims was entered April 6, 1942 (R. 20). On May 12, 1942, petitioner filed a motion for a new trial which was overruled June 1, 1942 (R. 20–21). The petition for a writ of certiorari was filed August 31, 1942. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether a producer and ginner of cotton who purchased tax exemption certificates from a pool established by the Secretary of Agriculture, and thereafter surrendered the certificates in lieu of payment of the ginning tax, can recover from the United States the amount paid for the certificates.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are the same as those involved in the case of *J. H. Crain and R. E. Lee Wilson, Jr., Trustees of Lee Wilson & Co., a Business Trust* v. *United States,* No. 199, this Term, and reference is made to our brief in opposition in that case where they are set forth. In addition, Section 151 of the Judicial Code (U. S. C., Title 28, Sec. 257), also applicable in this case, is as follows:

> SEC. 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether

there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.

STATEMENT

The findings of fact of the Court of Claims (R. 7–13) may be summarized as follows:

On July 7, 1941, the Senate of the United States passed a resolution known as S. Res. 136, 77th Cong., 1st Sess., which reads as follows (R. 7):

> *Resolved,* That the bill (S. 1628)[1] entitled "A bill for the relief of S. R. Brackin," now pending in the Senate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911; and the said court shall proceed with the same in accordance with the provisions of such Act and report to the Senate in accordance therewith.

The Bankhead Cotton Act, c. 157, 48 Stat. 598, imposed a tax on the ginning of cotton which was not exempt from the tax at the rate of 50% of the average central market price per pound of seven-eighth inch Middling Spot cotton, but in no event less than 5 cents per pound of lint cotton. The Act required that each bale of cotton after

[1] S. 1628, 77th Cong., 1st Sess., is as follows:

> A BILL
>
> For the relief of S. R. Brackin.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to S. R. Brackin, the amount of $346.20, together with interest thereon, at the rate of 4 per centum from the date of payment of such amount as taxes under Public Law numbered 169, Seventy-third Congress. Amounts expended for certificates used in lieu of tax payments shall be considered as taxes hereunder.

ginning be identified by a bale tag attached by the ginner indicating whether the cotton was exempt from tax or the tax had been paid. The amount of tax exemption certificates to which a cotton producer was entitled was determined by certain formulae set forth in the Act. After exhausting his tax-exemption certificates a producer could either pay the tax to the ginner, place his cotton in storage, or he could purchase further tax-exemption certificates from other cotton producers at prices prescribed by the Secretary of Agriculture as the official transfer rate (R. 7–8).

Under the Act an allotment of tax-exemption certificates was made to each cotton farmer upon application filed in accordance with prescribed regulations. Tax-exemption certificates could be transferred or assigned in such manner as the Secretary of Agriculture prescribed. To facilitate such transfer between producers, the Secretary of Agriculture established a series of three national surplus cotton tax-exemption certificate pools. The money collected by the pools from the farmers wishing to purchase certificates belonged to and were distributed to the farmers who had placed their surplus certificates therein for disposition after deducting a small amount for the administrative expenses of the pool (R. 9).

The remittances made by purchasers of certificates from each pool were deposited by the pool manager in the United States Treasury and pay-

ments to the participants in the pool were made by Government checks. No funds received in connection with the pool were covered into the general fund of the Treasury[2] and the United States did not profit or receive any benefit from the operation of the pools. Producers who desired to buy cotton tax exemption certificates from the pool forwarded with their orders for certificates checks or money orders made payable to the order of E. L. Deal, Certificate Pool Manager, and were by him endorsed for deposit in the Treasury to the account of G. F. Allen, Chief Disbursing Officer, Division of Disbursement. The funds were deposited in a special trust account (R. 9–10).

Petitioner is a cotton producer who received his share of tax exemption certificates. However, he produced cotton in excess of his allotment and on November 14, 1935, purchased from the 1935 pool three tax exemption certificates representing 8,655 pounds of lint cotton for which he made payment to the pool manager by cashier's check in the amount of $346.20 (R. 12).

On May 27, 1939, petitioner filed a claim with the Commissioner of Internal Revenue for the refund of the sum of $800 which included the

[2] The Court of Claims refused to reconsider these findings in the light of the correspondence, set forth at pp. 25–30 of the petition. That correspondence was submitted to the Court of Claims merely out of an abundance of caution, and does not constitute any admission of its relevance.

amount claimed in this case, i. e., $346.20. The claim was rejected by the Commissioner of Internal Revenue by letter dated August 28, 1939 (R. 12).

ARGUMENT

This suit was brought in the Court of Claims based upon a Senate bill referring the claim of S. R. Brackin, the petitioner, to the Court of Claims under the provisions of the Act of March 3, 1911, c. 231, 36 Stat. 1135 (see Section 151 thereof, *supra*). On the merits, this case presents the same question that is involved in *J. H. Crain and R. E. Lee Wilson, Jr., Trustees of Lee Wilson & Co., a Business Trust,* v. *United States,* No. 199, present Term, pending on petition for certiorari. The brief for the United States in opposition in that case sets forth reasons for the denial of the petition which are equally applicable here.

CONCLUSION

The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

OCTOBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 363.

S. R. BRACKIN, PETITIONER,
v.
THE UNITED STATES.

On a Petition for a Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

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THE McQUEEN PRESS.

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REPLY BRIEF OF PETITIONER.

The petition was filed August 31, 1942. Respondent filed its brief in opposition on or about October 6, 1942. This brief is in reply to respondent's brief.

Respondent states (Br. 6) that "no funds received in connection with the pool were covered into the general fund of the Treasury and the United States did not profit or receive any benefit from the operation of the pools." This was a conclusion of the Court of Claims set out as a finding of fact (Finding 10-R. 9), but it is difficult to harmonize it with the finding (F. 19-R. 12) that the check with which petitioner purchased his certificates, after being deposited in the Treas-

sury, was endorsed as follows: "This check is in payment of an obligation to the United States and must be paid at par, W. A. Julian, Treasurer, U. S."

Respondent was doubtless so concerned about this inconsistency in the Court's findings that it caused a letter of inquiry to be addressed to the Secretary of the Treasury by the Attorney General inquiring as to the status of the money collected by the Secretary of Agriculture for the sale of exemption certificates through the pools (pp. 25–6 of the petition herein). After receiving a reply thereto from the Acting Secretary (pp. 26–30 of the petition herein), respondent then decided to call to the attention of the Court of Claims the apparent error in its findings. (See pp. 6–7 of the petition herein.) The motion which respondent filed in this connection was untimely and the Court of Claims denied it forthwith. It is apparent that the findings and conclusion of the Court of Claims were not only wrong, but that respondent in effect now concedes it.

Of course, respondent does not desire to occupy an inconsistent position, but the footnote on page 6 of its brief is an unsatisfactory explanation of its present position. It there states that "the Court of Claims refused to reconsider these findings in the light of the correspondence, set forth at pp. 25–30 of the petition" and that "that correspondence was submitted to the Court of Claims merely out of an abundance of caution." There is no ground for stating that the Court of Claims *refused to reconsider* its findings. All that the record shows is (R. 21) that respondent's motion was filed *out of time* (under the Court's rules) and was overruled. In view of these facts, it must appear that respondent in effect admits that the decision of the Court of Claims is in error. Such being the case, the petition should be granted.

Since respondent relies on its brief in opposition to the petition for certiorari in *J. H. Crain et al.* v. *United States*, No. 199 present term, as discussing "the same question" that is involved herein, it seems only fair to request this Court to consider in connection with this petition the reasons for granting

the writ set out by petitioner in that case, as well as the reply brief of the petitioner.

WHEREFORE, it is respectfully submitted that the petition should be granted.

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